ESTATE OF WILLIAM (KONOA) JACKSON

IBIA 77-12 Decided May 4, 1977

Appeal from an Administrative Law Judge's decision denying petition for a rehearing.

Affirmed.

1. Indian Probate: Adoption: Generally

   An alleged adoption cannot be recognized where it has not been effected under any of the provisions of 25 U.S.C. § 372a (1970).

2. Indian Probate: Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 464 et seq. (1970)): Generally

   The Act recognizes two classes of persons who may take testator's lands by devise, that is, any member of the Tribe having jurisdiction over such lands and legal heirs of the testator.

3. Indian Probate: Indian Reorganization Act of June 18, 1934 (25 U.S.C. § 464 et seq. (1970)): Construction of Sec. 4

   "Any heir of such member" as used in sec. 464 means those who would, in the absence of a will, have been entitled to share in the estate.

4. Indian Probate: Generally--Indian Probate: Secretary's Authority: Generally

   The Department of the Interior does not have authority to declare a federal statute unconstitutional.

APPEARANCES: Barney Reagan, Attorney for Appellant, Margie Jackson, Special Administrator of the Estate of Violet Jackson Hensley Rhodes Van Riper; John Warner, of Weber, Bosch, Kuhr, Dugdale, Warner and Martin, for Appellee, Josephine Mary Jackson St. Marks.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before this Board on an appeal filed by Margie Jackson as Special Administrator of the Estate of Violet Hensley, also known as Violet Van Riper, through her attorney, Barney Reagan, from an Administrative Law Judge's denial to grant a petition for rehearing.

For convenience sake the parties involved in this appeal will be referred to as follows:

William (Konoa) Jackson, as decedent; Josephine Mary Jackson St. Marks as appellee; Violet Jackson Hensley Rhodes Van Riper, now deceased, as Van Riper; and Margie Jackson as Appellant.

Briefly stated the facts leading up to the appeal herein are as follows:

William Jackson, the decedent, was born June 16, 1891, and died on October 19, 1965. The decedent was an enrolled member of the Blackfeet Tribe of the State of Montana and is identified as Blackfeet Allottee No. 2441.

Two wills were purportedly executed by the decedent. The first will was dated August 13, 1957. The second will was dated August 8, 1960. Both wills left all of the decedent's trust property situated on the Blackfeet Reservation in Montana to Van Riper.

A hearing in the estate herein was duly held and concluded at Billings, Montana, on November 4, 1969, for the purposes of ascertaining the decedent's heirs, examining the purported wills hereinbefore identified and considering creditor's claims.

On May 3, 1974, Administrative Law Judge Frances C. Elge disapproved both of decedent's wills and found the appellee, as adopted daughter, the sole heir to the decedent's trust estate. Thereafter, on July 15, 1974, Violet Van Riper, through her attorney Barney Reagan, filed a petition for rehearing.

The Administrative Law Judge denied the petition for rehearing on September 16, 1976. It is from that denial that the appeal herein was taken by the Appellant as Special Administrator of the Estate of Van Riper, who died subsequent to the filing of the petition for rehearing but prior to the denial thereof.

The appeal is based substantially on the same grounds set forth in Van Riper's petition for rehearing which were summarized by Judge Elge in her order of September 16, 1976 as follows:

> A. The Administrative Law Judge erred in finding the respondent to be the daughter of the deceased and his sole heir, to the exclusion of petitioner.
>
> B. The Administrative Law Judge erred in not finding the petitioner to be the adopted daughter of the deceased.
>
> C. The Administrative Law Judge erred in finding that the petitioner was neither an heir at law nor a member of the Blackfeet Tribe and, therefore, not qualified as a devisee of trust lands on the Blackfeet Indian Reservation under 25 U.S.C. § 464.
>
> D. The petitioner, on June 10, 1974, was enrolled as a member of the Blackfeet Tribe and, therefore, is qualified to take the estate by devise.

Having reviewed the record and considered the briefs of the Appellant and the Appellee, the Board finds that the Appellant has not presented anything new relating to the foregoing arguments. Appellant's contentions have already been fully and extensively considered and discussed by the Judge in the Order Denying Petition for Rehearing dated September 16, 1976, a copy whereof is attached and incorporated herein. Accordingly, we see no reason why the Judge's findings of fact and conclusions of law set forth in the Order of September 16, 1976, supra, should not be affirmed.

Appellant, in addition to the other contentions hereinbefore listed, raises for the first time a constitutional issue questioning the authority of Congress to enact legislation such as 25 U.S.C. § 464 (1970) which restricts alienation of Indian lands except as to "heirs" of an Indian, or other tribal members. The property involved herein is subject to the jurisdiction and laws of the United States as enacted by the Congress, which has unlimited power to control the devolution of trust estates of Indians. One of the main purposes of the Wheeler-Howard Act was to stop alienation of lands belonging to Indian wards since such lands were vital to the present and future needs of Indians. See Felix Cohen's Handbook of Indian Law, p. 84; Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971).

[4] Assuming arguendo that such legislation is constitutionally impermissible as alleged, this forum speaking for the Department is without authority to declare it as such. Only the courts have the authority to do so. Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975); Estate of Benjamin Harrison Stowhy and Estate of Mary G. Guiney Harrison, 1 IBIA 269, 79 I.D. 428 (1972).

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing dated September 16, 1976, be, and the same is hereby affirmed for the reasons set forth in the said order, supra, which is incorporated herein by reference and made a part hereof.

This decision is final for the Department.

Done at Arlington, Virginia.

_____
Alexander H. Wilson
Chief Administrative Judge

We concur:

_____
Mitchell J. Sabagh
Administrative Judge

_____
Wm. Philip Horton
Administrative Judge

Attachment

United States Department of the Interior
Office of Hearings and Appeals
Administrative Law Judge
c/o Bureau of Indian Affairs
Billings, Montana 59101

PROBATE
IP BI 14A 71
IP BI 132A 75

IN THE MATTER OF THE ESTATE OF	:	
WILLIAM (KONOA) JACKSON, DECEASED	:	ORDER DENYING
ALLOTTEE 2441 OF THE BLACKFEET	:	PETITION FOR REHEARING
INDIAN RESERVATION IN MONTANA	:	

William (Konoa) Jackson, sometimes known as William Jackson #1 and William Joseph Jackson, hereinafter referred to as William Jackson or the deceased, died October 19, 1965, at the age of 84 years, possessed of trust real property located on the Blackfeet Indian Reservation in Montana.

On May 3, 1974, an order was issued in this estate wherein the deceased's purported will of October 3, 1960, and that of August 13, 1957, were disapproved and Josephine Mary Jackson LaMere St. Marks was found to be the deceased's adopted daughter and sole heir. Said order was based upon extensive Discussion and Findings of even date therewith. A copy of that document, marked Exhibit A, is attached hereto and by this reference, made a part hereof. Numbered paragraphs of said exhibit will hereinafter be referred to for particulars.

By the purported August 13, 1957, will, the deceased devised all of his estate to "my adopted daughter, who is also my niece, Violet Hensley, Blackfeet Unallotted, unenrolled. . ." Exhibit 8. In the purported will of October 3, 1960, he devised all of his property "to my niece, Violet Jackson Hensley." Exhibit 9.

On July 1, 1974, counsel for said devisee Violet Jackson Hensley Rhodes Van Riper, hereinafter referred to as the petitioner, requested an extension of time within which to file a petition for rehearing. Pursuant to 43 CFR 4.22(f), an extension of time to and including July 16, 1974, was granted.

On July 16, 1974, the petitioner, through her counsel, Barney Reagan, Esq., of Cut Bank, Montana, filed her petition for rehearing, together with a memorandum in support thereof. Josephine Mary Jackson LaMere St. Marks, hereinafter referred to as the respondent, through her counsel, John Warner, Esq., of Havre, Montana, filed a memorandum in opposition thereto.

1/ Petitioner died on April 25, 1976, at Indianapolis, Indiana.

Summarized, the alleged grounds for the granting a rehearing are that:

A. The Administrative Law Judge erred in finding the respondent to be the daughter of the deceased and his sole heir, to the exclusion of petitioner.

B. The Administrative Law Judge erred in not finding the petitioner to be the adopted daughter of the deceased.

C. The Administrative Law Judge erred in finding that the petitioner was neither an heir at law nor a member of the Blackfeet Tribe and, therefore, not qualified as a devisee of trust lands on the Blackfeet Indian Reservation under 25 U.S.C. § 464.

D. The petitioner, on June 10, 1974, was enrolled as a member of the Blackfeet Tribe and, therefore, is qualified to take the estate by devise.

We find no merit in the petitioner's argument with respect to ground A, above, pages 4 and 5 of petition and memorandum. The controlling act, 25 U.S.C. § 372a, reads:

§372a. Heirs by adoption

In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption--

(1) Unless such adoption shall have been--

(a) by a judgment or decree of a State court;

(b) by a judgment or decree of an Indian court;

(c) by a written adoption approved by the superintendent of the agency having jurisdiction over the tribe of which either the adopted child or the adoptive parent is a member, and duly recorded in a book kept by the superintendent for that purpose; or

(d) by an adoption in accordance with a procedure established by the tribal authority, recognized by the Department of the Interior, of the tribe either of the adopted child or the adoptive parent, and duly recorded in a book kept by the tribe for that purpose; or

(2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date: Provided, That an adoption by Indian custom made prior to the effective date of this section may be made valid by recordation with the superintendent if both the adopted child and the adoptive parent are still living if the adoptive parent requests that the adoption be recorded, and if the adopted child is an adult and makes such a request or the superintendent on behalf of a minor child approves of the recordation.

* * * * * *

The listing of the respondent as the deceased's daughter appeared officially on the 1919 census roll prepared by the Superintendent, Blackfeet Indian Agency, and this judge so found. Paragraph 3 of attached Exhibit A. Exhibit 1, the 1918 census, has penned notations, under the typed name William Jackson, "wife Chippewa-Josephine Denny"; then,"Divr wife" with a line drawn through the typed name Annie; and handwritten in the next line, "Josephine Mary dau". The 1918 census, from which Exhibit 1 was taken, contained penned changes for the preparation of the 1919 census. Thus, there is no inconsistency between the census records and the testimony of the respondent's mother that, after the birth of her son William Jackson, Jr., the deceased "came home one time and said he adopted her [the respondent] and that she was going to have land with the rest of the Piegans." Tr. 4. See also paragraph 3 on page 2 of Exhibit a attached hereto.

Whatever the motive of the deceased in adopting the respondent, it is uncontroverted that he did so. He established the relationship of father and daughter, a relationship recognized by the Blackfeet Indian Agency in 1919, some 22 years before the effective date of the 1940 Adoption Act, supra. The authenticity of the documentation cannot be challenged. The census records fall within the ancient documents rule; they are unique in that they pertain to no individuals other than members of the Blackfeet Tribe of Indians and their family relationships, bringing the adoptive relationship of the deceased and the respondent squarely within the provision for heirship through Indian custom adoption antedating the effective date of the Act; namely, recognition thereof by the Department of the Interior prior to said effective date. See also paragraphs 3, 4, and 5 on pages 1 and 2 of attached Exhibit A.

Petitioner raises the question of the validity of the deceased's divorce by Indian custom from his first wife [not relevant

to the issues in this case.] Because the divorce was the subject of a finding (Exhibit A, paragraph 2, page 1), I shall deal with the matter briefly. Indian custom marriages and divorces, from time immemorial, have been, and in some jurisdictions, still are, recognized by State and Federal courts and by the Department. The leading authority thereon is the Solicitor's exhaustive opinion of April 12, 1930, in the Estate of Noah Bredell, a deceased Nez Perce Indian, 53 I.D. 78. The holding, as stated in the syllabus, was:

> Where Indians, participants in a ceremonial marriage, both of whom were still living in Tribal relations, separated with the clear intention of not living together again, such separation constitutes a valid Indian custom divorce.

It was held in an Oklahoma case dealing with tribal custom marriage and divorce, Kunkel v. Barnett, 10 F.2d 804, 805 (1926):

> By the custom established, no formal contract or ceremony is essential to a marriage; a mere meeting and cohabitation as husband and wife constitute marriage. By the same custom a divorce may be effected by mutual consent.

An Indian custom divorce may be effected unilaterally by either of the parties to a marriage; such as desertion with the intention of the deserter that the separation be permanent. Estate of Sarah Chah-se-nah (Sarah Bruner), IA-2 (1949). See also the Estate of Jeannette Scott Edland, IA-107, 63 I.D. 141. Suffice it that the strongest corroboration of the deceased's intent that his separation from his first wife be permanent, was his ceremonial marriage to, and cohabitation with, his second wife. 2/

The second ground set out by petitioner is that the Administrative Law Judge erred in finding that petitioner was not the adopted daughter of the deceased.

[1] Petitioner argues, page 8 of her memorandum, that her adoption by the deceased could have been placed of record with such

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2/ Indian custom marriages and divorces among members of the Blackfeet Tribe, consummated prior to May 6, 1937, were and are recognized. On that date, the Tribe adopted an ordinance to the effect that: "All members of the Blackfeet Indian Tribe hereafter shall be governed by State laws and subject to State jurisdiction with respect to marriage, divorces, and adoptions hereafter consummated." On November 20, 1967, by amendment, The Tribe provided that common law marriages "shall not be recognized within the Blackfeet Reservation."

recordation approved by the superintendent, had they been properly advised. Had there, in fact, been such an Indian custom adoption, confirmation in writing could have been accomplished and, if approved by the Superintendent, would have effected the petitioner's status as an adopted daughter and heir of the deceased. It cannot be determined what advice, if any, may have been given to the petitioner and the deceased by anyone at the Blackfeet Indian Agency. Whatever, the alleged adoption cannot be recognized since it was not effected under any of the provisions of 25 U.S.C. § 372(1), nor was it recognized in any record mentioned in subsection (2). The fact that the lack may have been the result of an omission on the part of Departmental personnel does not cure the deficiency. In the Estate of Walks With A Wolf, deceased, Crow Allottee 137, 65 I.D. 92 (1958), it was uncontroverted that the deceased and his wife had aopted Elizabeth Tobacco when she was a small child. At the time of the death of Walks With A Wolf, there was on file at the Crow Indian Agency a Confirmation of Adoption subscribed and sworn to on May 5, 1937, by Walks With A Wolf, adoptive father, then 63 years of age, and on May 20, 1937, by Elizabeth Tobacco, adopted daughter, then 27 years of age, both before Anna G. Sloan, a Notary Public, in compliance with the Crow Adoption Act. Approval by the Superintendent had not been endorsed thereon. The controlling statute in that case was the Crow Adoption Act of March 3, 1931, 46 Stat. 1494, under the terms of which the Bureau of Indian Affairs issued instructions for confirmations of adoptions.

Added to testimony given at the hearing in Walks With A Wolf, was the deposition of Robert Yellowtail who was Superintendent at the Crow Indian Agency in May 1937. He could not recall ever having seen the document until on or about the fall of 1953. He knew of no reason why the document was not presented to him for approval. He stated that had it been presented he would have approved it. It was held by the Deputy Solicitor of the Department that Elizabeth Tobacco could not be held to be the adopted daughter of the deceased; that the initiation of action to obtain the required approval of the superintendent is ineffective where such approval was not given and, therefore, a status as an adopted heir of the decedent is not achieved.

In the Walks With A Wolf case, the parties had done everything they could to have the prior Indian custom adoption recognized. In the case at bar, there was no record at all by which the alleged adoption could be recognized under the provisions of 25 U.S.C. 372a. If the adoption could not be recognized in Walks With A Wolf, even more, the alleged adoption of the petitioner by the deceased cannot be recognized in the instant case.

Counsel queries whether the superintendent's letter of September 3, 1957, recounting "Mr. Jackson stated that his brother gave him Violet and that she is his adopted daughter . . ." constituted a recognition. Patently, it does not. Arguendo, that it constituted a recognition, it would not change the relationship of the petitioner to the deceased. Any recognition by the Bureau of Indian Affairs to make an early Indian custom adoption effective for heirship had to have occurred prior to the effective date of the Adoption Act. It became effective January 8, 1940.

In support of ground C of the petition, set forth on page 2 hereof, petitioner argues that the word "Heir", as found in 25 U.S.C. § 464, should not be construed in the strict historical sense of one who would ordinarily inherit under the law of succession; that as used in the section, "heir" means a class of people that exist within the table of succession.

[2] In Exhibit A hereto, paragraph 7, appears the finding with which petitioner disagrees. She also takes issue with the holding of the Board of Indian Appeals in the Estate of Rose Josephine LaRose Wilson Eli (2 IBIA 60, 80 I.D. 620 (1973)), that under said § 464, a devisee of land must be an heir at law of the testator or a member of the Tribe involved. Her dispute is with the definition of "heir". In the Eli case the devisee was a grandson of the testatrix (son of a living daughter of testatrix). The Board held the grandson not qualified because he wasn't an heir of the testatrix nor a member of the Tribe involved. Petitioner also claims that the Solicitor's opinion of August 17, 1934, Devise of Restricted Indian Lands under section 4, Wheeler-Howard Act, 4 I.D. 584, does not fully address itself to the issue in the instant case; to-wit, the meaning of "heirs" under the statute. Petitioner is mistaken. In the opinion, at page 586, the Solicitor discussed the legislative history of the act, early drafts of which had limited the privilege of receiving property to the members of the testator's tribe; the phrase "or any heirs of such member" was added by committee amendment. The conclusion of the Solicitor, with respect to legislative intent, was:

> . . . It seems clear that the purpose of these legislative afterthoughts was not to alter fundamentally the intent and scope of the original restriction but rather to provide for the exigencies of a special case that had not been distinctly considered, namely, the case of an Indian testator desiring to divide his estate by will among those who would, in the absence of a will, have been entitled to share in the estate, his own heirs.

An early decision in point is that in the Estate of Left Hand or John Left Hand, Probate 11223-39. In that case, a grandson of the testator (son of a living son) had been devised Pine Ridge trust real property which was subject to the provisions of 25 U.S.C. § 464. The devisee was an enrolled Rosebud Sioux. The Acting Secretary of the Interior approved the recommendation of A. B. Melzner, Acting Commissioner of Indian Affairs, and held that the devise to the grandson was inoperative and that the land involved passed to the residuary devisee who was both an heir at law and an enrolled Pine Ridge Sioux.

[3] Later cases have consistently held that the words "any heir of such member" as used in 25 U.S.C. § 464 mean those who would, in absence of a will, have been entitled to share in the estate. Estate of Emma Blowsnake Good Bear Mike, also known as Emma Walking Priest, IA-916 (1960); Estate of Rose Josephine LaRose Wilson Eli, supra; Estate of Lucinda Shelton Joe, 5 IBIA 20 (1976).

Petitioner's position with respect to the meaning of heirs under 25 U.S.C. § 464 must be rejected for the reason that it is contrary to the Department's consistent interpretation. [Under petitioner's theory a testator could devise property to anyone related by blood, ad infinitum, a possibility chaotic of contemplation.]

To support the last ground asserted by petitioner, ground D, that she became an enrolled member of the Blackfeet Tribe on June 10, 1974, and that, by reason of that enrollment, she became qualified to receive property by will, petitioner supplied documentation evidencing Tribal action to effect her enrollment, attachments F and G to said petition. It is correct that the purported enrollment documentation is new evidence since the action occurred something over a month after the issuance of the May 3, 1974, order disapproving wills and determining heirship but admission thereof would be ineffective to change the result in this case.

This judge cannot agree with Petitioner's counsel that the petitioner was an enrolled member of the Blackfeet Tribe on June 10, 1974, or at any other time, for that matter. She is not qualified for enrollment under the provisions of the Blackfeet Constitution. The pertinent section of Article II thereof reads:

> Section 1. The members of the Blackfeet Tribe shall consist as follows:
>
> (a) All persons of Indian blood whose names appear on the official census roll of the tribe as of January 1, 1935.

(b) All children born [prior to the adoption of this amendment (August 30, 1962)] to any blood member of the Blackfeet Tribe maintaining a legal residence within the territory of the Reservation at the time of such birth.

(c) All children having one-fourth (1/4) degree of Blackfeet Indian blood or more born after the adoption of this amendment to any blood member of the Blackfeet Tribe. 13/

The petitioner's name did not appear on the official census roll of the Tribe as of January 1, 1935. Neither her mother nor father was an enrolled member of the Tribe. It follows that the petitioner could not be enrolled under the constitutional provisions.

The Blackfeet Tribal Business Council adopted a resolution on June 10, 1974, approving the enrollment of the petitioner and three of her siblings, subject to approval by the Secretary of the Interior. See Petition for Rehearing, attachments F and G. The Tribe has no authority to approve such enrollment for the reason that it is contrary to the quoted constitutional provision, supra.

It would seem beyond question that a Tribe is bound by its own constitution. None the less, the Flathead Tribal Council attempted a membership action violative of the Tribes' constitutional provisions. With respect thereto, the Solicitor held that the Tribal Council could not ignore the requirements of its tribal constitution and use a roll other than the constitutional roll which it was required to make. 58 I.D. 628. See also Federal Indian Law, U. S. Department of the Interior, U. S. Government Printing Office, pages 416, 417 (1958).

If the petitioner's enrollment had been effected in 1974, such enrollment would not affect her status as a devisee in that she was not enrolled at the time William Jackson died, October 19, 1965, the date upon which title vested. Page on Wills, Vol. 4, § 1586 at page 506 et seq. (1941). In the Left Hand case supra, the grandson of the testator, Evan Lee Left Hand could have been enrolled as a member of the Oglala Sioux Tribe of the Pine Ridge Reservation but he was not. In Acting Commissioner Melzner's recommendation, as

3/ Said § 1 as it appears in the record in this estate, page 1 of Exhibit 10, is the original version, prior to the 1962 amendments. The 1962 amendments are the portions of the section shown in the text within brackets.

approved by Acting Assistant Secretary Mendenhall, it was stated:

> . . . the only way in which Evan Lee Left Hand could now be enrolled with the Oglala Sioux would be through adoption into the tribe. Such belated adoption, however, regardless of whether it might have a retroactive effect for other purposes, could not operate to qualify Evan Lee Left Hand to receive this devise in derogation of the vested rights of others. Since the rights of all parties under the will must be determined as of the date of the testator's death, it must be held that this child was not qualified as of that date, thereby making the devise to him inoperative as of that date and vesting the property in the testator's wife, Jessie Left Hand, Pine Ridge allottee No. 5013, named as residuary beneficiary.

For the foregoing reasons said petition for rehearing is without merit.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by § 1 of the act of June 25, 1910 (25 U.S.C. § 372), and other applicable statutes, and pursuant to 43 CFR Part 4, I hereby find, adjudge, and declare that the petition for rehearing filed in this estate by the late Violet Jackson Hensley Rhodes Van Riper be, and hereby is, denied.

Done at Billings, Montana, September 16, 1976.

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Frances C. Elge
Administrative Law Judge

United States Department of the Interior
Office of Hearings and Appeals
Administrative Law Judge
c/o Bureau of Indian Affairs
Billings, Montana 59101

PROBATE
IP BI 14A 71

IN THE MATTER OF THE ESTATE OF)
WILLIAM (KONOA) JACKSON,)
DECEASED ALLOTTEE 2441 OF THE) DISCUSSION AND FINDINGS
BLACKFEET INDIAN RESERVATION)
IN MONTANA)

1. William (Konoa) Jackson, sometimes known as William Jackson, No. 1, and William Joseph Jackson, hereinafter referred to as William Jackson or the deceased, died October 19, 1965, at the age of 84 years, possessed of trust real property located on the Blackfeet Indian Reservation in Montana.

HEIRSHIP

2. William Jackson was first married to Annie (Littleplume) Nightgun by Indian custom about 1912. One child Agnes (Mary Louise) Jackson was born of this marriage on October 1, 1912. The deceased and Annie were divorced, Indian custom, about 1914. Their child Agnes died in 1916. In 1917 the deceased started living with Josephine Mary Denny, a Rocky Boy Chippewa, at a time when her daughter Josephine Mary, No. 2, hereinafter referred to as Josephine or Josephine Jackson, was about 10 months old. Tr. 4. The deceased and Josephine Mary Denny were married by license and ceremony on May 12, 1919. A son William Jackson, Jr., was born to them in 1919; he died December 24, 1923. The deceased and Josephine Mary were divorced in 1925 in the District Court at Havre, Montana. He remained single and fathered no children thereafter.

3. Josephine Mary Denny Jackson, now Marsette, testified that the deceased, with respect to Josephine, "came home one time and said he adopted her and that she was going to have land with the rest of the Piegans." The deceased apparently claimed Josephine as his natural daughter. Her name was written in on the 1918 Blackfeet census as a daughter of William Jackson, Allottee 2441, with her birth date shown as 1916. Exhibit 1. The entry was probably in preparation for the next ensuing census, that for 1919, wherein the name Josephine Jackson #2 was typed as was the name William Jackson #2 with his birth date shown as 1919. Exhibit 2. William Jackson #2 and Josephine Jackson #2 were shown as the children of the deceased and as allottees 3002 and 3001, respectively, in the June 30, 1920, census record. Exhibit 3. Josephine was similarly shown on the census records for 1921, June 30, 1922, June 30, 1923, and December 31, 1936. Exhibits 4 through 7. Thus

her relationship to the deceased as a daughter was recognized by the Department of the Interior beginning with 1919 and continuing through the years.

4. It is provided in 25 U. S. C. § 372a, in pertinent portion, as follows:

> 372a. Heirs by adoption
>
> In probate matters under the exclusive jurisdiction of the Secretary of the Interior, no person shall be recognized as an heir of a deceased Indian by virtue of an adoption--
>
> * * * * * *
>
> (2) Unless such adoption shall have been recognized by the Department of the Interior prior to the effective date of this section or in the distribution of the estate of an Indian who has died prior to that date * * *. (Emphasis supplied.)

The act became effective January 8, 1941, six months after the date of its approval on July 8, 1940.

5. Under the provisions of said § 372a, Josephine Jackson, now Josephine St. Mark, must be recognized as the adopted daughter and sole heir of the deceased.

WILLS

6. The deceased executed a purported last will and testament on August 13, 1957, wherein he devised all of his property to "my adopted daughter, who is also my niece, Violet Hensley, Blackfeet unallotted, unenrolled . . ." Exhibit 8. No evidence was presented that the devisee was the deceased's adopted daughter, Indian-custom or otherwise. The deceased executed a second will in Great Falls, Montana, on August 8, 1960, wherein he devised all of his property "to my niece, VIOLET JACKSON HENSLEY." Exhibit 9.

7. The trust lands of the decedent are situated on the Blackfeet Indian Reservation in Montana, and are subject to the provisions of the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. 464, under which such lands may not be devised to any person who is not an heir at law of the decedent or a member of the tribe of such reservation, in this case, the Blackfeet Tribe. Since Violet Jackson Hensley, now Violet Jackson Van Riper, is neither an heir at law nor

a member of the Blackfeet Tribe, she is not qualified as a devisee of any trust lands on the Blackfeet Indian Reservation. In this connection, see Estate of Rose Josephine LaRose Wilson Eli, IBIA 74-13, 2 IBIA 60, 80 I.D. 620 (1973) which reiterates the consistent holding of the Department that such a devisee must be an heir at law of the testator or an enrolled member of the tribe involved. In the circumstances both wills must be disapproved. Accordingly, the deceased died intestate.

CLAIM OF VIOLET JACKSON VAN RIPER

8. Mrs. Violet Jackson Hensley Rhodes Van Riper, hereinafter referred to as Violet Van Riper, or the claimant, filed a claim against this estate for a total of $15,000.00.

9. In paragraph 2 of the claim, in the form of an affidavit dated August 17, 1967, it is asserted that the claimant had the deceased in her home at 2811 Sixth Avenue North, in Great Falls, Montana, where she took care of him for a period of approximately 75 months and that she expended great effort and money toward his care "including, but not confined to nursing, financial support, maintenance, transportation, clothing, medicines, drugs and other necessities of life."

10. Paragraph 4 of the affidavit reads:

> 4. That affiant considers $15,000.00 to be a conservative estimate of what she has coming as reasonable reimbursement for the time and effort expended, without considering the actual out of pocket expenses involved. The $15,000.00 figure is computed roughly on the basis of the $250.00 per month which the court had originally allowed affiant when she was acting as Guardian of the person and Estate of deceased pursuant to her appointment on January 24, 1958. Affiant estimates that actual out of pocket expenditures would amount to $12,000.00.

11. The Allegations of paragraph 4 confound and puzzle this Judge. If Violet Van Riper is filing a claim for $250.00 a month for 75 months, that total would be $18,750.00. If the alleged out of pocket expenses are added, the grand total would be $30,750.00. This is a case where the burden of accounts and accounting has been shifted from the claimant to the Judge.

12. According to the claim, the period of care started June 1, 1955, and ended August 20, 1964, making a total period of over 108 months; we are then to find that the claimant housed and cared for the deceased for 75 undesignated months within the end dates furnished.

13. Correspondence in the Blackfeet Indian Agency files establishes that the deceased resided in Yakima and Seattle, Washington, in 1955; that he resided in Seattle, Yakima, and the Tacoma area, Washington, in 1956; and that he resided in Seattle and Yakima, Washington, until August in 1957. Exhibit 10, pages 63, 65 through 101, 103 through 107; Exhibit 11, pages 9 through 28.

14. On August 5, 1957, William Jackson wrote to the Superintendent from the claimant's Great Falls address. Exhibit 11, page 8. He resided with her during the remainder of 1957 except for part of December when he resided at 320 Second Avenue South, Great Falls. Exhibit 11, pages 52, 53, 54. It is concluded that the deceased resided in the claimant's home four and a half months in 1957. He could have been there for short visits prior to 1957, the total of how long in days, weeks, or months not being determinable.

15. During 1958, 1959, and 1960, and for half of January 1961, the deceased was generally under the supervision and care of the claimant. Of the period between November 23, 1959, and November 13, 1960, he was hospitalized in Deaconess Hospital in Great Falls, Montana, a total of 50 days and in the USPHS Hospital, Browning, Montana, a total of 45 days, making a grand total of 95 days, or 3-1/6 months. During 1958 he spent over a month with a Lee Waddell at East Glacier, Montana. Exhibit 10, pages 26, 50; Exhibit 12, pages 1, 2. On January 15, 1961, the deceased was admitted to the Deaconess Hospital, Great Falls, Montana, whence he was transferred on January 16 to the USPHS Hospital in Browning, Montana, where he remained until February 22, 1961. On the latter date, he was transferred to the Glacier County Rest Home at Cut Bank, Montana, where he stayed until January 5, 1964, except for the period of July 8 to 16, 1962, eight days when he was in Great Falls with the claimant. Exhibit 10, pages 13, 21, 26, 41; Exhibit 12, page 3.

16. From January 5, 1964, to February 10, 1964, or 36 days, the deceased was in the claimant's home in Great Falls; from February 10 through February 14, he was in the Deaconess Hospital, Great Falls; from February 14 through June 15, he was in the McCauley Rest Home in Great Falls; from June 15 to August 20, 1964, he was in the USPHS Hospital in Browning, Montana; from August 20 to October 7, 1964, he was at the Glacier County Rest Home in Cut Bank; from October 7 to October 18, 1964, he was in the USPHS Hospital at Browning; on October 18, 1964, he was transferred to the Deaconess Hospital in Great Falls, Montana, where he died the next day. Exhibit 11, pages 1 through 9; page 1, of Guardian's Accounting of April 3, 1964, in Exhibit 14; Exhibit 12, page 8; Exhibit 13.

17. It is concluded that from August 1, 1957, until his death, the deceased could have been under the actual supervision of the claimant for a total of approximately 37-3/4 months.

18. On January 24, 1958, by order of the District Court of the Eighth Judicial District of Montana, Cascade County (sitting at Great Falls, Montana), Cause No. 11148, the claimant was appointed guardian of the person and estate of the deceased and Letters of Guardianship were issued to her; Exhibit 14. From that time until April 20, 1964, all income accruing to the account of the deceased at the Blackfeet Indian Agency was given to the claimant as guardian. She also received payments that didn't go through the Agency account from lessees of the deceased's trust farm lands. Exhibit 11; Exhibit 10, page 32; Exhibit 15.

19. After letters of Guardianship were filed, the next document in the District Court record is a petition filed January 15, 1960, wherein the claimant accounted for the receipt of $9,947.86 as oil rental from her ward's real estate and requested payment to her of $250.00 per month for caring for the deceased in her home. The request was granted.

20. The second document filed in the proceeding after issuance of Letters of Guardianship was a petition in the nature of an accounting filed February 1, 1960. The claimant averred that on December 12, 1958, she received $877.14 from a farm lease and that on January 15, 1960, she received a check in the sum of $9,947.86. She neglected to account for check 18420, March 25, 1958, $44.74; check 9269, March 18, 1959, $15.09; check 11760, May 11, 1959, $34.66; check 62063, June 24, 1959, $3.78; and check 66049, November 25, 1959, $56.53. The unmentioned checks total $154.80. Exhibit 15.

21. In her petition, the claimant showed expenditures on behalf of the deceased in the sum of $1,453.50. Among the documents filed in support of the expenditures were unreceipted bills, timepay charge slips, and a conditional sales contract entered into individually by the claimant in the amount of $149.50 of which only $22.56 had been paid. Of the expenditures totaling $800.84, those totaling $361.17 should not have been allowed because they were not supported by proof of payment.

22. Of the canceled checks filed, four between January 6, 1957, and April 24, 1959, totaling $94.50, were drawn against the checking account of "Lee or Violet Hensley"; six between March 22 and August 14, 1958, totaling $77.95, were drawn against the checking account of "Violet Hensley." Both accounts were in the Great Falls National Bank. There was no checking account for the Estate of

William Jackson, an incompetent. It is interesting to note that two of the charge slips were in the name, and one receipt was in favor, of Lee Hensley. Additionally, a receipt dated July 17, 1959, for a payment of $15.00 made by Mr. Lee Hensley to R. J. Holzberger, M.D., had the notation "For Tom Hensley."

23. In his order of February 11, 1960, the Court approved the claimant's account and payments to the claimant as follows:

1. $1,453.50 for expenditures made out of her own funds on behalf of the deceased;

2. $500.00 for extraordinary care and services; and

3. The payment to her of $250.00 each and every month as and for the care, support and maintenance of William Joseph Jackson, an incompetent.

Included was a payment to the claimant of $935.00, room and board for the deceased for a period of eleven months from January 24 through December 31, 1958.

24. On April 20, 1960, the claimant filed a supplemental accounting, showing a cash balance in her ward's estate, from the last accounting, of $7,494.36, expenditures of $3,441.60, and a balance of $4,052.76. In that accounting were shown payments to the claimant of $250.00 per month for caring for the deceased for February through June 1960. Additionally there were payments to the claimant of $46.95, $18.00, $25.00, and $25.00, or a total of $114.95 between February 1 and April 1, 1960, with no showing as to what the deceased received therefor. No supporting documents were filed with the accounting.

25. In the same accounting there was shown a payment of $69.50 to the Great Falls Clinic on February 11, 1960. The Clinic account shows that such payment included a November 5, 1959, charge of $14.50 for which the claimant was credited in her earlier accounting. The April 1960 accounting also showed a payment of $568.00 to the Great Falls Clinic on March 14,1960. This amount included $109.00 transferred by the Clinic from the Lee Hensley account to the decedent's account on March 2, 1960, at the request of the claimant. Exhibit 16.

26. The claimant's next accounting was filed June 26, 1963, covering the period from April 1, 1960, to December 31, 1962. Therein, in addition to the balance of $4,052.76 from the April 1, 1960, accounting the claimant showed receipts for 1961 and 1962 of $577.11, making a total of $4,629.87 in assets.

27. It is noted that during May, June, July, August, September, and October 1960, the claimant was reimbursed an even $25.00 per month or $150.00 for medicine and miscellaneous medical bills. During the same 9 months the claimant was reimbursed $104.05 for payments to drug stores for medicine and drugs.

28. The claimant was credited with a payment of $319.50 as of August 4, 1960, for a massage chair. There is no evidence that the equipment was prescribed or that approval of the Court was had for this major expenditure. For whose use and benefit was it purchased? For whose use and benefit was the fishing and camping equipment purchased on May 10, 1960, in the amount of $74.49?

29. In the next ensuing accounting for the period ending December 31, 1962, the claimant was twice credited with a payment on August 1, 1960, in the amount of $377.65 to the Deaconess Hospital. She was credited with a payment of $34.55 to the Hospital on January 16, 1961; this charge was not paid and remains unpaid. Exhibit 14. The claimant showed a payment of $312.65 to the Great Falls Clinic in June 1961; a payment of $250.00 to the Clinic on September 18, 1962; and a payment of $708.50 to the Clinic on July 24, 1962. These payments totaling $1,271.15, if made, were not supported by vouchers and could not have been for services rendered the deceased. The only credits on the William Jackson Clinic account after March 15, 1960, were $10.00 in May 1963 and $5.00 in July 1963. There remains due and unpaid a balance of $313.58. Exhibit 16.

30. On April 7, 1964, the claimant filed her last accounting. There she showed payments to the Deaconess Hospital totaling $231.00. The amounts were not paid and the total is still due and owing. Exhibit 10, pages 10, 11; Exhibit 14, April 3, 1964, accounting and vouchers. She showed payments totaling $297.58 to the Great Falls Clinic, none of which was or has been paid except $15.00, supra. She showed a payment of $311.60 on June 19, 1963, for dentures which were not purchased for the deceased. Exhibit 10, page 21. She also claimed reimbursement in the amount of $324.96, payment on November 13, 1963, for a plot at Sunset Memorial Gardens at Great Falls, Montana. Lee Hensley, the late husband of the claimant, died in 1965 and is buried at Sunset Memorial Gardens; the deceased is buried at Browning, Montana. Other credits, supported by charge slips or bills instead of receipts totaled $46.90. Thus, in the 1964 accounting, the claimant showed expenditures not allowable in the total sum of $1,197.04.

31. The June 1963 accounting shows payments to the claimant of $250.00 per month for July through December 1963. The April 20, 1960, accounting and that of June 26, 1963, show that the claimant

received a total of $2,920.00 for the period of February 1, 1960, through January of 1961. During that period, in 1960, the deceased was hospitalized a total of 84 days or 2-4/5 months. Exhibit 10, page 26; Exhibit 12, pages 1, 2. The deceased was under the claimant's care only 15 days in January 1961 for which she received $170.00; this should be reduced by $45.00. Care during the 2-4/5 months, supra, amounts to $700.00 which, plus the January 1961 excess of $45.00, totals $745.00 overpayment received by the claimant for care during the period of February 1, 1960, to January 15, 1961. She should have received $2,175.00 for the period.

32. The claimant was paid for board and room for the deceased from January 24 through December 31, 1958. Her accounts do not show payments for board and room for 1959 and January 1960, for four and a half months in 1957, or for January 1958, a total of 18-1/2 months. At the rate for board and room she requested and which the Court allowed, $85.00 per month, there are $1,572.50 for which the claimant was not credited in her account. Reduced by an excess paid of $745.00, supra, and by $102.00 for the time the deceased spent in East Glacier with Lee Waddell in 1958, the balance due the claimant for board and room is $725.00.

33. After the claimant's appointment as guardian in January 1958 and until April 20, 1964, the claimant received funds belonging to the deceased in the total amount of $16,431.31. She reported a total of $11,402.11. She received $5,029.20 for which she has not accounted. She credited herself with expenditures of $15,536.75 of which more than $4,006.90 were not allowable, reducing the allowable expenditures to $11,529.85. Her receipts for the period of her guardianship, $16,431.31, less possibly allowable expenditures of $11,529.85 leaves a balance of $4,901.46. Against this balance may be offset board and room in the amount of $725.50, leaving a balance of $4,175.96 owing to this estate from the claimant.

34. In the claimant's penned account in Exhibit A associated with her claim against this estate for the period of March 10, 1956, through 1957, she asks $85.00 a month board and room. An allowance has already been made, supra, at that rate for the time the deceased spent in her home between August 1 and December 31, 1957. This leaves 16-1/3 months of the period covered; of that period, the deceased could not have been in Great Falls for 13 of those months, correspondence from him having shown him to have been in the state of Washington--Yakima, Seattle, Puyallup, Tacoma. See paragraph 13, supra.

35. In the claimant's account of expenditures in Exhibit A to support her claim against the deceased's trust estate, she listed

alleged purchases and payments totaling $5,286.88 which theretofore were included in her guardianship accounting and for which she had been reimbursed out of her ward's funds.

36. At a hearing in this estate, on August 18, 1967, the claimant in response to her counsel's questions, testified as follows:

> Q. During this period of time from June 1955 to August 1964, did Mr. Jackson live with you there continuously, under your care and custody?
>
> A. Yes, he did. Only a few occasions where he would go out and back again.
>
> * * * * * *
>
> Q. At any rate, from June 1955 to January 1958, what ever period of years that would be, he resided with you, without you being appointed guardian?
>
> A. That's right.

The claimant was of exceedingly short memory. Her testimony with respect to the years 1955 through the first half of 1957 and for the period from January 15, 1961, to August, 1964 is clearly in error. See paragraphs 13 through 16, supra. Her testimony was patently in error with respect to the length of time the deceased stayed in her home, the length of time of his incontinence during which period she had to diaper him--three and a half to four years. Tr. 11 (1967 hearing). He wasn't under her care that long. See paragraphs 14 to 17, supra. Her testimony was vague and replete with generalities; she produced no accounts other than the documents submitted as Exhibit A to her affidavit of claim.

37. The deceased executed a general power of attorney in favor of the claimant on August 15, 1957 (Exhibit 10, page 62), followed by her legal guardianship. From August 15, 1957, until William Jackson's death, the claimant's role was that of a fiduciary. Under the power of attorney, the claimant was the agent of William Jackson. As stated in 3 Am. Jur. 2d § 199, p. 580 (1962), an agent is a fiduciary with respect to the matters within the scope of his agency and the agent is bound to exercise the utmost good faith, loyalty, and honesty toward his principal. A guardian's standard of conduct is equally exacting, if not more so.

38. The position of guardian is one of trust and not of agency. See Pethybridge v. First State Bank of Livingston (Mont. 1926),

243 P. 569. The law of trusts applies with respect to the care which the guardian must exercise in managing his ward's property. In 90 C.J.S., Trusts, § 247 d., p. 238 (1955), it is stated:

> A trustee is a fiduciary of the highest order, who is required meticulously to observe the fiduciary relationship and to perform the obligations of a trustee to the cestui que trust (in this case, ward), and is held to a high standard of conduct with respect to the administration of the trust. In this respect, it has often been stated that a trustee is held to something stricter than the morals of the market place, and not honesty alone but the punctilio of an honor most sensitive is the standard of behavior.

39. In this case, the first and continuing breach of trust was the guardian's intermingling her ward's funds with her own. Other violations include failure to account for income accruing to the ward's estate, conversion of his funds to pay her husband's bill at the Great Falls Clinic, and crediting herself with payments not made. Moreover, with the ward's funds in the checking account of the guardian and in the joint checking account of guardian's husband and the guardian, there is no way of determining from the canceled checks filed in the guardianship proceeding nor from those filed to support the claim against the instant estate what was received and for whom the funds were expended.

40. The gross negligence of the claimant in the handling of William Jackson's funds, the proved conversion of some of those funds to her own use, the false guardianship accounts wherein she received credit for payments not made and for charges for services not rendered for her ward, and for failure to report funds received are in such violation of the claimant's duties as a fiduciary that her claim against this estate must be denied in its entirety. To allow this claim, or any portion thereof, would be abortive of the very purpose of the trusteeship of the United States over Indian trust property.

Done at Billings, Montana, May 3, 1974.

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Frances C. Elge
Administrative Law Judge